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BANK MUAMALAT MALAYSIA BHD

v.

SUHAILI ABDUL RAHMAN & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD JC
[CIVIL SUIT NO: 22A-119-02-2013]
29 OCTOBER 2013

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CIVIL PROCEDURE: *Summary judgment - Application for - Locus standi - Whether guarantor bank had locus standi to commence action against defendants separately - Whether action should be taken by guarantor banks collectively - Whether straight forward case to be disposed off summarily - Certificate of indebtedness - Whether conclusive prove of amount outstanding - Whether triable issues raised - Rules of Court 2012, O. 14*

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The plaintiff filed an application *vide* encl. 7 pursuant to O. 14 of the Rules of Court 2012 ('ROC') for summary judgment to be entered against the second defendant for the sum of RM9,918,791.22 which was due and payable under a joint and several guarantee and indemnity related to a guarantee ('Al-Kafalah') facility of RM30,000,000 granted by BSN Commercial Bank (Malaysia) Berhad and MNI Takaful Sdn Bhd ('the financiers') to Moccis Trading Sdn Bhd ('Moccis'). Perwira Affin Merchant Bank Berhad was the facility agent who acted as the arranger and agent for the financiers and had made available to Moccis under the Shariah principles of *Al-Bai Bithamin Ajil*, a syndicated guaranteed *Al-Bai Bithaman Ajil* financing facility of RM30,000,000 ('Al-Kafalah BBA Facility'). The facility agent further arranged for a syndicated (Al-Kafalah) bank guarantee of RM30,000,000 ('Al-Kafalah guarantee') to be provided by Al-Kafalah guarantor banks comprising of EON Bank Berhad, Bank Muamalat Malaysia and Bank Utama (Malaysia) Berhad to guarantee the payment obligations of Moccis to the financiers. It was also provided that the guaranteed amount in respect of each of the Al-Kafalah guarantor bank was limited to RM10,000,000. The respective parties had entered into a guarantee Al-Kafalah facility agreement dated 20 May 1998 ('Al-Kafalah facility agreement') and a guarantee dated 20 May 1998 ('Al-Kafalah bank guarantee'). As there was a change of shareholders in Moccis, the plaintiff bank, as one of the Al-Kafalah guarantor banks required the first and second defendants to issue a personal guarantee which was duly executed in favour of the plaintiff bank as an additional security. The plaintiff bank made payment on the Al-Kafalah Bank guarantee in the sum of RM10,000,000. However, under the Al-Kafalah facility agreement, Moccis failed to fulfil its obligations to settle the sum due to the plaintiff bank. The second

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defendant however filed an application *vide* encl. 9 to strike out the plaintiff's claim under O. 18 r. 19(1)(b) of the ROC. It was the second defendant's contention that the Al-Kafalah facility agreement and the guarantee were executed by the Al-Kafalah guarantor banks collectively for the sum of RM30,000,000. Thus, it was contended that the plaintiff had no *locus standi* to commence this action against the second defendant separately. The second defendant alleged that any action taken against the second defendant under the said guarantee should be taken by the three Al-Kafalah guarantor banks collectively. In the alternative, the second defendant had also contended that the second defendant had a defence on the merits. The second defendant denied having executed the said guarantee in favour of the plaintiff bank and was not aware of the contents of the guarantee. In addition, the second defendant also contended that the terms of the said guarantee were prejudicial as it had made provisions to allow for variations to the original facility between the Al-Kafalah guarantor banks and Moccis to be made without first obtaining the second defendant's consent. The plaintiff, to supports its claim, exhibited the certificate of indebtedness to prove that Moccis had defaulted in its obligation pursuant to the Al-Kafalah facility agreement. The issues that arose for consideration were (i) whether the plaintiff had the *locus standi* to commence an action against the second defendant; (ii) whether the plaintiff's claim was unsustainable and ought to be dismissed *in limine*; (iii) whether the second defendant had a defence on the merits or had raised triable issues to merit a full blown trial; and (iv) whether the certificate of indebtedness was conclusive evidence of the second defendant's indebtedness to the financiers.

Held (allowing encl. 7; dismissing encl. 9 with costs):

(1) The plaintiff had the *locus standi* to commence this action against the second defendant to claim the amount up to the limit guaranteed by the second defendant, which was RM9,918,791.22, after taking into consideration the sum of payments made to the plaintiff bank. Thus, the issue raised by the second defendant pertaining to the *locus standi* of the plaintiff to commence this proceeding against the second defendant did not pass the test of a *bona fide* as envisaged by *Cempaka Finance Bhd v. Ho Lai Yin & Anor*. (paras 40 & 41)

(2) As a party who had executed the said guarantee, the second defendant was bound by the terms of the said guarantee although the second defendant had not read the contents of the contract. Unless the second defendant could establish that the said guarantee was executed by way of fraud, misrepresentation and undue influence, the second defendant must honour the said guarantee and pay the overdue amount as agreed under the said instrument.

A Therefore, the second defendant's contention that he did not sign the said guarantee and that he was not aware of the terms of the said guarantee were baseless. (paras 47 & 48)

(3) The second defendant had not discharged the burden to prove that the certificate of indebtedness was tainted with manifest errors. Therefore, there was conclusive evidence of the amount outstanding owed by Moccis under the Al-Kafalah facility agreement. The second defendant's affidavits contained bare averments and denials and did not give rise to triable issues. On the contrary, the plaintiff had exhibited sufficient documents to show that the second defendants' denials not only had no basis in fact but were also made in bad faith. As such, the plaintiff's case was a straightforward and proper case to be disposed of by way of summary judgment under O. 14 of the ROC. The plaintiff's case was not frivolous, vexatious and scandalous as claimed by the second defendant to warrant the same to be struck out *in limine*. The second defendant's application *vide* encl. 9 was thus dismissed. (paras 51 & 54-56)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bradburne v. Botfield [1845] 153 ER 597 ***(refd)***

Cempaka Finance Bhd v. Ho Lai Yin & Anor [2006] 3 CLJ 544 FC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Mahathir Mohamad [2001] 1 CLJ 519 CA ***(refd)***

Ernest Cheong Yong Yin v. Low Kim Yap & Ors [2006] 6 CLJ 608 HC ***(refd)***

Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 CLJ 9; [1987] CLJ (Rep) 120 SC ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***

L'estrange v. F Graucob, Ltd [1934] 2 KB 394 ***(refd)***

Lloyd's v. Harper (1880), 16 Ch D 290 397 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

MK Varma & Anor v. KM Oli Mohamed [1950] 1 LNS 39; [1950] 16 MLJ 80 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(refd)***

Service and Supply International (UK) Limited v. General Entertainment Investments Limited and John Oakley [1991] WL 11780398 ***(refd)***

Tan Chong and Sons Motor Company Ltd v. Yang Chin Lang [1966] 1 LNS 193 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 46
Rules of Court 2012, O. 14 r. 2, O. 18 r. 19(1)(b)

For the plaintiff - Ng Sai Yeang (JQ Chong with her); M/s Raja, Darryl & Loh
For the defendant - Wan Azmir Wan Majid (SJ Choo with him); M/s Hafarizam Wan & Aisha Mubarak

Reported by Sandra Gabriel

JUDGMENT

Asmabi Mohamad JC:

Introduction

[1] There were two applications fixed for hearing before me. The first was the application filed by the applicant/plaintiff ("plaintiff bank") pursuant to O. 14 of the Rules of Court 2012 ("ROC") for summary judgment to be entered against the second defendant for the sum of RM9,918,791.22 which was due and payable under the joint and several guarantee and indemnity relating to a guarantee (Al-Kafalah) facility of Ringgit Malaysia thirty million (RM30 million) granted by BSN Commercial Bank (Malaysia) Berhad and MNI Takaful Sdn Bhd (the "financiers") to Moccis Trading Sdn Bhd ("Moccis") ("encl. 7"). This financing facility was premised on the Islamic principle of financing known as *Al-Bai Bithamin Ajil*.

[2] The second application was an application filed by the second defendant pursuant to O. 18 r. 19 (b) of the ROC ("encl. 9") to strike out the plaintiff bank's claim against the second defendant based on the ground that the plaintiff bank's claim was frivolous, vexatious and scandalous.

[3] At the outset of the hearing of encl. 7 both learned counsels indicated to me that the triable issue raised by the second defendant with regard to the *locus standi* of the plaintiff bank to commence this action against the second defendant was in fact the same as the issue relied by the second defendant to strike out the plaintiff bank's claim under O. 18 r. 19 (b) of the ROC. Therefore the determination of the issue raised by the second defendant in encl. 7 would also ultimately resolve the issue as to whether the second defendant would succeed in his application *vide* encl. 9.

[4] Upon perusal of the affidavits and the relevant submissions filed herein and upon hearing learned counsels for the plaintiff and the second defendant, on 2 August 2013 this court allowed summary judgment to

be entered against the second defendant as prayed in encl. 7 with costs. On the same day this court had also dismissed the second defendant's application to strike out the plaintiff bank's claim *vide* encl. 9 with costs. After hearing a short submission on costs, this court had awarded costs of RM4,000 to be paid by the second defendant to the plaintiff bank for both encls. 7 and 9.

[5] Aggrieved by both the decisions made by me on 2 August 2013, the second defendant appealed to the Court of Appeal Malaysia against the whole of the said decisions.

[6] For ease of reference, the applicant in encl. 7 and the respondent in encl. 9 would be referred to as the "plaintiff bank" and the respondent in encl. 7 and applicant in encl. 9 would be referred to as the "second defendant" respectively.

The Applications

[7] *Vide* encl. 7 the plaintiff bank sought the following orders:

(a) Judgment for the sum of RM9,918,791.22;

(b) Late payment charges at the rate of 5% per annum from date of judgment till date of realisation;

(c) Cost of this action;

(d) Costs based on solicitor client basis; and

(e) Any other reliefs as deemed necessary by this court.

[8] *Vide* encl. 9, the second defendant had sought for the plaintiff's claim to be struck out with costs on the ground that it was frivolous, vexatious and scandalous.

[9] For the purpose of these two applications the following documents were filed herein and considered by this court:

(a) Writ and statement of claim dated 25 February 2013 ("encl. 1");

(b) The amended statement of claim dated 25 March 2013 ("encl. 5");

(c) Defence dated 9 April 2013 ("encl. 6");

(d) Notice of application under O. 14 of ROC dated 10 April 2013 ("encl. 7");

(e) Plaintiff's affidavit in support of encl. 7 affirmed by Mostapa bin Othman on 10 April 2013 ("encl. 8");

(f) Second defendant's notice of application under O. 18 r. 19 of the ROC dated 17 April 2013 ("encl. 9");

(g) Second defendant's affidavit in support of encl. 9 affirmed by Mohd Zaini bin Mohd Ariff on 17 April 2013 ("encl. 10");

(h) Plaintiff's affidavit in reply affirmed by Mostapa bin Othman on 30 April 2013 ("encl. 15");

(i) Plaintiff's affidavit affirmed by Mostapa bin Othman on 30 April 2013 ("encl. 14");

(j) Second defendant's affidavit in reply affirmed by Mohd Zaini bin Mohd Ariff on 17 May 2013 ("encl. 17"); and

(k) Plaintiff's affidavit in reply affirmed by Mostapa bin Othman on 31 May 2013 ("encl. 18").

[10] The grounds for the said encl. 7 were as stated in the said enclosure as well as the affidavits of Mostapa bin Othman affirmed on 10 April 2013 ("encl. 8"), 30 April 2013 ("encl. 14") and 31 May 2013 ("encl. 18") respectively. In essence the plaintiff bank averred that there were no merits in the second defendant's defence. Neither could the second defendant raise triable issues to merit a full blown trial.

[11] The grounds of the second defendant's application *vide* encl. 9 were as stated in the affidavit filed by the second defendant affirmed on 17 April 2013 ("encl. 10"). One of the issues raised by the second defendant for the purpose of encl. 7 was the same issue relied by the second defendant to strike out the plaintiff bank's claim *vide* encl. 9.

Background Facts

[12] Perwira Affin Merchant Bank Berhad, the facility agent who was acting as the arranger and agent for the financiers comprising of BSN Commercial Bank (Malaysia) Berhad and MNI Takaful Sdn Bhd (the "financiers") had arranged with the financiers and made available to Moccis Trading Sdn Bhd ("Moccis") under the Shariah principles of *Al-Bai Bithamin Ajil*, a syndicated Guaranteed *Al-Bai Bithaman Ajil* financing facility of Ringgit Malaysia thirty million (RM30,000,000) only (the "Al-Kafalah BBA facility") (see exh. "MBO-2 and MBO-3" of encl. 8).

[13] The facility agent as the arranger and agent for the above said financiers further arranged for a syndicated (Al-Kafalah) bank guarantee of Ringgit Malaysia thirty million (RM30 million) only (the "(Al-Kafalah) guarantee") to be provided by (Al-Kafalah) guarantor banks comprising of Eon Bank Berhad, Bank Muamalat Malaysia and Bank Utama

(Malaysia) Berhad to guarantee the payment obligations of Moccis to the financiers (exh. "MBO-1 and MBO-4" of encl. 8). It was also provided that the guaranteed amount in respect of each of the (Al-Kafalah) guarantor bank was limited to Ringgit Malaysia ten million (RM10 million) only. For the purpose of the arrangement mentioned herein the respective parties had entered into a guarantee (Al-Kafalah) facility agreement dated 20 May 1998 (exh. "MBO-1" of encl. 8) ("Al-Kafalah facility agreement") and a guarantee dated 20 May 1998 (exh. "MBO-4" of encl. 8) ("Al-Kafalah bank guarantee").

[14] As there was a change of shareholders in Moccis, the plaintiff bank, as one of the (Al-Kafalah) guarantor banks required the first and second defendants to issue a personal guarantee which was duly executed in favour of the plaintiff bank as an additional security for the plaintiff bank granting the Al-Kafalah bank guarantee (exh. "MBO-5" of encl. 8). Under the guarantee, the first and second defendants' liability to the plaintiff bank was to the extent of Ringgit Malaysia ten million (RM10 million) which sum, was the sum required of the plaintiff bank to make good under the Al-Kafalah bank guarantee to the financiers (see joint and several guarantee and indemnity dated 20 November 2000 exh. "MBO-6 of encl. 8 and exh. "MBO-6A" of encl. 14).

[15] The plaintiff bank had made payment on the Al-Kafalah bank guarantee in the sum of Ringgit Malaysia ten million (RM10 million). Moccis had failed to fulfil its obligations under the Al-Kafalah facility agreement (exh. "MBO-1" of encl. 8) as it had failed and/or refused to settle the sums falling due and payable to the plaintiff bank despite several indulgences having been granted to it. On 4 July 2011 Moccis was ordered to be wound up (exh. "MBO-9" of encl. 8).

[16] The plaintiff bank had then instructed its solicitors to issue a notice of demand to the first and second defendants to make payment of the guaranteed amount of RM10 million due under the guarantee ("the personal guarantee") (exh. "MBO-6" of encl. 8 and exh. "MBO-6A" of encl. 14) for which Moccis, the debtor had not made payment of (exh. "MBO-10" of encl. 8). The balance sum claimed by the plaintiff bank as stated in the said notice of demand was RM9,918,791.22 after having deducted certain payments which were made by Moccis.

[17] The second defendant had refused, neglected and/or failed to settle the sums claimed by the plaintiff bank. Hence this civil action was brought against both the first and second defendants pursuant to the guarantee executed by the first and second defendants in favour of the plaintiff bank (exh. "MBO-6A" of encl. 14).

Issues Raised By The Second Defendant

[18] In his attempt to resist the plaintiff's application for the prayers sought pursuant to encl. 7, the second defendant raised the following issues:

(a) The plaintiff had no *locus standi* to commence this action against the second defendant; and/or in the alternative; and

(b) There are merits in the second defendant's defence.

The Law

Order 14 Of ROC

[19] In *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300, the Federal Court had clearly laid down the preliminary requirements in an application for summary judgment under the O. 14 of the then Rules of the High Court 1980 (now the ROC) as follows:

(a) The defendant had entered appearance;

(b) The statement of claim must have been served on the defendant; and

(c) The affidavit in support of the application must comply with the requirements of r. 2 of O. 14. The application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim.

[20] Once the plaintiff had satisfied the three requirements as set out in the above quoted case, the plaintiff has established a *prima facie* case and is entitled to judgment. The burden then shifted to the defendant to show the merits in the defence.

[21] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full blown trial, the matter ought to be resolved and decided in an O. 14 application. The court should only exercise the power under the said provision in very clear cases *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; *Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 CLJ 9; [1987] CLJ (Rep) 120.

[22] In *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 His Lordship Raja Azlan Shah CJ, (as His Highness was then) had stated as follows:

A That brings us to the important question whether the assistant registrar was entitled to deal with the case under the RSC O. 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this
B court, shall not deal with the whole matter under RSC O. 14 procedure.

[23] In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the Supreme Court observed that:
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... the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only has raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before
D the court.

[24] In the same case, the Supreme Court went on to state as follows:

... apart from identifying the issues of fact and law, the court must go one step further and determine whether they are triable. This principle
E is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[25] In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 the Court of
F Appeal held as follows:

The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision
G should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

(see *National Company of Foreign Trade v. Kayu Raya Sdn Bhd*
H [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283).

Order 18 Of The ROC

[26] The principle upon which the court acts in exercising its power under O. 18 r. 19 of the ROC is well settled and had been illustrated
I in numerous cases. It is only in plain and obvious cases that recourse should be had to the summary process under the rule. This summary process can only be adopted when it can be clearly seen that a claim is

"obviously unsustainable" (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11; *Dato' Seri Anwar Ibrahim v. Dato' Seri Mahathir Mohamad* [2001] 1 CLJ 519 at p. 525; *Ernest Cheong Yong Yin v. Low Kim Yap & Ors* [2006] 6 CLJ 608 at para. 21 and 22 at p. 617).

Findings Of This Court

[27] With the above principles in mind, I shall now decide whether the plaintiff bank's claim is so clear, straight forward and could be resolved without having to go for a full blown trial and/or whether the plaintiff bank's claim is obviously unsustainable and ought to be dismissed *in limine.*

Enclosure 7

[28] It is important to bear in mind when deciding an application under O. 14 of the ROC, the court must look at the whole situation and be satisfied that the second defendant has no fair or reasonable probability in having a real or *bona fide* defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision. In *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328 the Supreme Court held:

> It can hardly be emphasized that in order for the court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[29] With the above principles in mind, I had to examine the documents placed before me in order to ascertain if the plaintiff was entitled to summary judgment as prayed in encl. 7 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue is triable. The determination of whether an issue is or is not triable would depend on the facts or the law as disclosed in the affidavit evidence before the court.

Issue 1 – Whether The Plaintiff Has The Locus Standi To Commence This Action Against The Second Defendant

[30] The first issue raised by the second defendant concerned the *locus standi* of the plaintiff to commence this action against the second defendant. It was the second defendant's contention that as the Al-Kafalah facility agreement (exh. "MBO-1" of encl. 8) and the

guarantee (exh. "MBO-6" of encl. 8 and exh. "MBO-6A" of encl. 14) both dated 20 May 1998 were executed by the (Al-Kafalah) guarantor banks collectively for the sum of RM30 million, the plaintiff bank had no *locus standi* to commence this action against the second defendant separately. The second defendant alleged that any action to be taken against the second defendant under the said guarantee shall be taken by the three (Al-Kafalah) guarantor banks collectively.

[31] According to the second defendant, the reading of cl. 2 of the guarantee showed, in the event Moccis had defaulted in its payment to the financiers, the defendants shall pay the guaranteed amount upon the first written demand by the (Al-Kafalah) guarantor banks. Clause 1 of the said guarantee had defined the (Al-Kafalah) guarantor banks to mean all the three institutions listed in Sch. II (exh. "MBO-6A" of encl. 14).

[32] Further the term guaranteed amount had been interpreted to mean the total aggregate amount of the guaranteed commitments of the (Al-Kafalah) guarantor banks amounting to RM30 million. Based on the interpretation of these clauses especially the use of the words "(Al-Kafalah) guarantor banks" would indicate that payment under the said guarantee shall be made only to the three institutions. The said guarantee did not make any provision for an institution under Sch. II of the said guarantee to commence an action on its own to recover the sum under the guarantee. The second defendant reiterated that any action to be commenced under the said guarantee must be brought by all the three institutions stated in Sch. II of the said guarantee collectively. Section 46 of the Contracts Act was quoted in support of learned counsel's submissions.

[33] A perusal of the definition of the term "guaranteed amount" as stated in the said guarantee means Ringgit Malaysia thirty million (RM30 million) and in relation to each (Al-Kafalah) guarantor bank, the commitment of each (Al-Kafalah) guarantor bank under the Al-Kafalah BBA facility, which amount shall be Ringgit Malaysia ten million (RM10 million) as stated in Sch. II of the said guarantee. The definition of "guaranteed amount" is as follows:

> ... means up to the total aggregate amount of the Guarantee Commitments of the (Al-Kafalah) Guarantor Banks under the Guarantee (Al-Kafalah) facility agreement amounting to Ringgit Malaysia Thirty Million (RM30,000,000) only *and/or in relation to each (Al-Kafalah) Guarantor Bank the Commitment of each (Al-Kafalah) Guarantor Bank under the Guarantee (Al-Kafalah) Facility which may have been paid to the Financier and which may at any time or from time to time be due and owing and outstanding and payable by the Customer to the (Al-Kafalah) Guarantor Banks* and shall also include all Guarantee Fees and all other monies and liabilities which the Guarantee (Al-Kafalah)

Facility Agreement provides are to be paid by the Customer to the (Al-Kafalah) Guarantor Banks or otherwise intended to be secured thereunder which may remain unpaid and which is due and owing and outstanding from the Customer to the (Al-Kafalah) Guarantor Banks. (emphasis added)

[34] From the above provision, the second defendant having conceded that the "guaranteed amount" as stated in the above-mentioned clause of the said guarantee is based on the separate commitments of each (Al-Kafalah) guarantor bank in the sum of RM10 million. Therefore the second defendant is not entitled to suggest otherwise. The plaintiff bank having paid out RM10 million is therefore entitled to claim the "guaranteed amount" up to the limit of its commitment, which was RM10 million.

[35] Section 46 of the Contracts Act 1950 had no application to the factual matrix of this case having regard to the fact that the second defendant's agreement under the said guarantee applied not to all the (Al-Kafalah) guarantor banks jointly but only for the sum of RM10 million which each (Al-Kafalah) guarantor bank guaranteed on behalf of Moccis. The illustration to s. 46 of the Contracts Act 1950 shows that in the event of joint obligations then the obligation of "B extends to B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly".

[36] The case of *Bradburne v. Botfield* [1845] 153 ER 597 cited by learned counsel for the second defendant had no relevance to the factual matrix of this case as the facts in that case showed that there are joint rights amongst the lessors of the subject property for the defendants to repair the premises and to surrender them in good repair. That being the case, the joint rights were to be exercised by the lessors jointly who had the rights to maintain the action and which right was not with the plaintiff exclusively. As regard the case of *Service and Supply International (UK) Limited v. General Entertainment Investments Limited and John Oakley* [1991] WL 11780398 quoted by learned counsel for the second defendant, the contract documents were in fact signed by one person for both SSI and KOS (as referred to in the said case) to create joint interest. Whilst in the case of *MK Varma & Anor v. KM Oli Mohamed* [1950] 1 LNS 39; [1950] 16 MLJ 80 the facts showed that the case was premised on partnership rights which cannot be maintained by the partners individually. The factual matrix of all these three cases could be distinguished from the case at hand.

[37] The factual matrix of the case at hand concerned a guarantee to each of the (Al-Kafalah) guarantor bank including the plaintiff bank based on the respective separate commitments as stated in the said guarantee. It is apparent from the facts of this case that the second defendant had

given the guarantee to each of the guarantor bank including the plaintiff bank based on their respective separate commitments. As stated in cl. 1.2 of the said guarantee, the right of each of the (Al-Kafalah) guarantor bank was up to the limit of RM10 million. The facts did not show that this was a case where all the (Al-Kafalah) guarantor banks claimed a joint right to the entire RM30 million.

[38] Reading cls. 13 and 24 of the said guarantee as well as looking at the surrounding circumstances of this case, it would appear that the plaintiff bank was only liable for RM10 million which the defendants had unconditionally and irrevocably undertaken to be liable jointly and severally and as sole, originally independent obligors to pay the guaranteed amounts as their liability being one of full indemnity.

[39] The issue between the plaintiff bank and the second defendant depended on the construction to be placed on the said guarantee. It was suggested in the case of *Tan Chong and Sons Motor Company Ltd v. Yang Chin Lang* [1966] 1 LNS 193; [1967] 1 MLJ 123 quoting the old case of *Lloyd's v. Harper* (1880), 16 Ch D 290, 397 that, "a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances".

[40] Upon the construction of the said guarantee, I am of the view that as there was an express provision with regard to the limit of each of the (Al-Kafalah) guarantor bank under the said guarantee which was stated as only RM10 million, the plaintiff bank has the *locus standi* to commence this action against the second defendant to claim the amount up to the limit guaranteed by the second defendant, which was RM9,918,791.22 after taking into consideration the sum of payments made to the plaintiff bank.

[41] For the reason I had illustrated above, the issue raised by the second defendant pertaining to the *locus standi* of the plaintiff bank to commence this proceeding against the second defendant did not pass the test of a *bona fide* as envisaged by *Cempaka Finance Bhd v. Ho Lai Yin & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685 (FC); *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400).

Issue 2 – The Second Defendant Has A Defence On The Merits And/Or The Second Defendant Had Raised Triable Issues To Merit A Full Blown Trial

[42] In the alternative, the second defendant had also contended that the second defendant had a defence on the merits. According to the second defendant, he was unsure as to whether he had executed the said guarantee in favour of the plaintiff bank. The second defendant had

also contended that neither was he aware of any of the terms stipulated in the said guarantee. The second defendant reiterated that it was unreasonable for him to execute the said guarantee because the facility that was granted to Moccis was secured by way of "receivables", the value of which exceeded the sum of RM30 million. The second defendant claimed that he was not involved in the management of Moccis in 2000. Therefore it was absurd to suggest that he had given the guarantee to a company not owned by him. In a nutshell the second defendant had denied having executed the said guarantee in favour of the plaintiff bank and/or being aware of the terms stated therein as alleged by the plaintiff bank.

[43] In addition to the above, the second defendant had also contended that the terms of the said guarantee were in fact prejudicial to him as it had made provision to allow for variations to the original facility between the (Al-Kafalah) guarantor banks and Moccis to be made without first obtaining the second defendant's consent. This would have the effect as if the second defendant had given consent to something which was vague and for something which was going to happen in the future.

[44] The second defendant too had no knowledge and/or neither was the second defendant informed of any attempts and/or negotiations between the plaintiff bank and Moccis as pleaded in para. 16 of the statement of claim.

[45] Based on the above the second defendant claimed that he had shown that he had a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence and ought to be given leave to defend by this court.

[46] With regard to the second defendant's assertion that he was not aware if at all he had executed the said guarantee and/or that he was not aware of the terms of the said guarantee, I am of the view that the second defendant was not entitled to raise this line of defence at this stage because as a party who had executed the said guarantee, the second defendant was bound by the terms of the said guarantee unless if it could be shown that the said guarantee was tainted with fraud, misrepresentation and undue influence. In order to reinforce this line of argument, I quoted herein an often quoted case of *Polygram Records Sdn Bhd v. Hillary Ang & Ors & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ 127 ("*Polygram*") which was decided by His Lordship Visu Sinnadurai J. In *Polygram*, His Lordship had held that a party who had executed a written contract is bound by the four corners of the written contract that he had signed unless if he could establish that the contract was tainted with fraud, misrepresentation and undue influence. Even in a situation that the party who had signed the contract has not read the contents of

A the contract, he is still bound by the terms of the contract. This established principle of law had been accepted by the court as early 1934 through the decision of Scrutton LJ in *L'estrange v. F Graucob Ltd* [1934] 2 KB 394 where His Lordship held:

B > When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

C **[47]** From the above quoted authorities unless the second defendant could establish that the said guarantee was executed by way of fraud, misrepresentation and undue influence, the second defendant must honour the said guarantee and pay the overdue amount as agreed by him under the said instrument. Upon perusal of the affidavit filed herein I found that the averments of the second defendant in the affidavit filed to oppose encl. 7 were bare denial and unsupported by evidence to show D the presence of the three elements mentioned above. Having executed the said guarantee, the second defendant is bound by the terms and words of the said guarantee.

E **[48]** The second defendant was a director of Moccis. Having executed the said guarantee, the second defendant had admitted to the contents of the said guarantee. It is trite law, as I had illustrated above, once a party to a contract had executed a contract, then in the absence of fraud, misrepresentation and/or undue influence, there being no evidence of such allegations, the second defendant is bound by the terms of the said F guarantee. Therefore the second defendant's contention that he did not sign the said guarantee and/or that he was not aware of the terms of the said guarantee are baseless.

[49] The second defendant's contention of not being in the management of Moccis in 2000 and therefore he would not have signed G the said guarantee is not relevant as the basis of the execution of the said guarantee was premised on the changes in Moccis's shareholding (see exh. "MBO-5" of encl. 8 and exh. "6A" of encl. 14).

[50] In view of the above reasoning the issue raised by the second H defendant was without any merits and ought to be dismissed by this court.

The Certificate Of Indebtedness Was Conclusive Evidence Of The Second Defendant Indebtedness To The Financiers

I **[51]** The plaintiff bank had also exhibited the certificate of indebtedness to prove to this court that Moccis had defaulted in its obligation pursuant to the Al-Kafalah facility agreement (exh. "MBO-14" of encl. 8) ("the certificate of indebtedness"). The second defendant had not

demonstrated to this court that there was manifest error in the certificate of indebtedness issued by the plaintiff bank. In view of the above, the second defendant had not discharged the burden to prove that the certificate of indebtedness was tainted with manifest errors. Therefore there was conclusive evidence before this court as regard to the amount outstanding owed by Moccis under the Al-Kafalah facility agreement. In *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 the court held:

> A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed. In the instant case, the relevant cls. 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England. The certificate of indebtedness, issued in accordance with the aforesaid cls. 27 and 7.03, was lucid enough. There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. (paras 6 & 7)

[52] Based on the above there is conclusive evidence before me with regard to the second defendant's liability to the plaintiff bank.

Conclusion

[53] I am satisfied that the plaintiff bank had demonstrated to this court that its application was correctly and properly filed and the second defendant had not discharged the burden to establish triable issues requiring a trial of the plaintiff's claim, in that, the issues that pass the test of *bona fide* triable issues to be supported by documents contemporaneous to the said joint and several guarantee and indemnity which are precise and/or consistent with the undisputed contemporary document (see *Cempaka Finance Bhd v. Ho Lai Yin & Anor* [2006] 3 CLJ 544; *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400).

[54] I am satisfied that the issues raised by the second defendant in the affidavits filed herein did not pass the test of "triable issues" as envisaged by the case law quoted above. The second defendant's affidavits contained bare averments and denials and did not constitute evidence and do not give rise to triable issues. On the contrary I found that the plaintiff bank had exhibited sufficient documents as required of it to show that the second defendants' denials not only have no basis in fact but are also made in bad faith.

[55] Having considered the pleadings, the affidavits filed herein and the submissions by the respective counsels from both sides and having given the matter a very careful and serious consideration, I am of the view, based on the facts in this case it is a straightforward and proper case to be disposed of by way of summary judgment under O. 14 of the ROC. Accordingly I allowed the prayers sought *vide* encl. 7 with cost to be paid by the second defendant to the plaintiff bank.

Enclosure 9

[56] With regard to the second defendant's application to strike out the plaintiff bank's claim *vide* encl. 9, I am satisfied in view of my above findings on the issue of *locus standi* in respect of encl. 7, the plaintiff bank' case was not frivolous, vexatious and scandalous as claimed by the second defendant to warrant the same to be struck out *in limine*. Hence for the above reason, encl. 9 was dismissed with costs. I had also awarded costs in the sum of RM4,000 to be paid by the second defendant to the plaintiff bank for both the enclosures.